

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2006-0028-FH

HUSAM WISAM FANDAKLY,

Defendant.

OPINION AND ORDER

Defendant moved for a *Franks*' hearing; to quash search warrant, and an *in camera* hearing with confidential source.

Following a preliminary hearing at the 41A Court, Hon. Kimberly Anne Wiegand, presiding, defendant was bound over to stand trial on the following charges: Two counts of delivery/mfg marihuana in violation of MCL 333.7401(2)(d), and one count of maintaining a drug house, contrary to MCL 333.7405(d). Defendant now moves to quash the search warrant on the bases discussed below.

Background

According to defendant, on July 5, 2005, a narcotics investigation began (COMET) in an apartment complex parking lot outside defendant's apartment building. Defendant submits that the COMET detectives viewed defendant's activities within his apartment through the use of binoculars. The detectives indicated they saw two males exchanging something. According to the prosecution, the investigation was instigated due to the frequent and plentiful number of vehicles and foot traffic that ultimately ended up in defendant's apartment for brief periods of time. The detectives believed the exchange between the parties was drugs for money. The



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prosecution submits that the action was not only seen through the binoculars, but also through the naked eye, as the parties stood in open view in front of a doorwall, where defendant was seen to have leaned down into a garbage bag and pull smaller baggies out. Defendant and the male then exited the apartment, defendant handed the male a Jet's Pizza box which was placed in the trunk of the car the male had arrived in. Within minutes, police stopped the male and recovered approximately a quarter pound of marijuana from inside the Jet's Pizza box. The detectives observed no one else in defendant's apartment, and observed that he was the only one who accessed the garbage bag. Following the stop, both the driver and the passenger of the Grand Am were arrested for delivery of marijuana. Based on this activity, the detectives sought and obtained a search warrant for the apartment.

Defendant argues that the detectives were required to have a search warrant before observing activity through the doorwall of defendant's apartment. Subsequently, an affidavit was prepared indicating that defendant and a male exchanged money for a package believed to be marijuana. Defendant was arrested outside of his apartment and transported to the police department prior to the execution of the search warrant, but was advised of its authorization.

Defendant's Arguments

Defendant first asserts that if the police are able to put binoculars through bedroom windows of an apartment complex from the parking lot 25 yards away, we are no longer safe from the intrusion of the government in our homes and our bedrooms. Defendant concedes that the United States Supreme Court has ruled that visual observation is no "search" at all. See *California v. Ciraolo*, 476 US 207, 213; 106 S Ct 1809 (1986), in which it was ruled that warrantless visual surveillance of a home does not constitute a "search" requiring a search warrant. The People append this case law, stating that under the open view doctrine (not to be

confused with the plain view doctrine) that what a person exposes to the public, even in his home or office, is not subject to Fourth Amendment rights. If there is no intrusion to a person's reasonable expectation of privacy, there is no search. Further, in *People v Beavers*, 393 Mich 554, 580; 227 NW2d 511 (1975), Chief Justice Coleman, dissenting, indicated that participant monitoring was no worse than viewing a premises through binoculars. In *United States v Lee*, 274 US 559, 563; 47 S Ct 746, 748; 71 L Ed 1202 (1927), the Court stated, "Use of a search light is comparable to the use of a marine glass or field glass. It is not prohibited by the Constitution."

A defendant may have a reasonable expectation of privacy in secluded areas outside the four walls of his home, but where a defendant conducts activities that are within view of passersby and neighbors, no reasonable expectation of privacy exists. *People v Ward*, 107 Mich App 38, 50; 308 NW2d 664 (1981). Accordingly, the Court found that no reasonable expectation of privacy existed and that the use of the telephoto lens to enhance the viewing officer's observations were not violative of defendant's rights. *Id.* The Court also noted that a 200mm lens gives a magnification of approximately four power, thus equating the observation to an observation made with magnification from a distance of 31 or 32 feet. *Id.* Accordingly, this Court finds no error.

Defendant next asserts that no sale took place, but maintains that according to COMET, there was a transaction with pre-recorded money. This is the core issue whereby defendant seeks a *Frank's* Hearing¹. Defendant contends that an affidavit was prepared that indicated that Detective Lehman observed defendant and a male exchange money for what was believed to be baggies of marijuana. The second issue brought forth in the affidavit was that the Confidential

¹ *Franks v Delaware*, 438 US 154 (1978). The purpose of a *Franks'* Hearing is to make a substantial preliminary showing that false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the search warrant affidavit and if the allegedly false statement is necessary to finding probable cause, the Fourth Amendment requires that a hearing be held at defendant's request.

Informant (CI) purchased marijuana with pre-recorded buy-money. Defendant maintains that there were no pre-recorded funds taken from him on the date on which he was arrested soon after the 8:15 PM purchase by the CI. The final issue is that the COMET team went into the apartment prior to the search warrant being delivered to defendant. Defendant contends he was arrested and taken from the scene before the search warrant was delivered.

According to the transcript of the preliminary exam, the parties stipulated to the substance in exchange for money was marijuana. Detective Lehman was part of the COMET team and had experience in surveillance and arrests on narcotics-related charges. On the day in question, Detective Lehman, along with Detective Sergeant Schmittler were parked approximately 25 yards away from defendant's apartment. Detective Lehman stated he had observed a large number of vehicles come and go after staying a short time, foot traffic in and out of the apartment, all indicative in his experience with narcotics activity.

At a point in time, Detective Lehman saw a silver Grand Am pull up driven by a female. A male passenger exited, went to defendant's apartment, and Detective Lehman observed the two of them first with his naked eyes, then with binoculars, stand in front of the window. He saw them exchange clear bags, rolled up, for money. The two males then moved to another room, in front of a doorwall and defendant leaned down into a garbage bag to pull smaller bags out. Detective Lehman next observed the two males exit the apartment. Defendant was carrying a Jet's Pizza box that he then handed to the other male. The male walked over to the silver Grand Am, put the pizza box in the trunk, got back in the car and the female then drove the car away. Detective Lehman then contacted Detective Jacquimaine to follow the vehicle.

Detective Lehman then contacted a prosecutor to make sure they had enough information to obtain a search warrant for the apartment. Detective Taylor prepared the affidavit and a

search warrant was then obtained. Prior to the search warrant actually being delivered to the premises, Detective Lehman testified that while defendant was outside arguing with his girlfriend, he was searched, whereupon \$143 were found on his person, and arrested and transported to the police station. When the search warrant was delivered, the officers then went into the apartment and found about 1300 grams of marijuana, a scale, and some packaging which were photographed and confiscated.

Detective Lehman testified that there were no prerecorded funds used as part of this investigation. Detective Lehman stated Detective Taylor prepared the search warrant, brought it to the scene prior to the search of the apartment, but Detective Lehman could not remember whether he actually looked at the warrant's contents or not.

Detective Jacquimaine took the stand next. Witness was instructed to follow the Grand Am as it left the apartment complex. Detective Jacquimaine stopped the vehicle based on the information received by Detective Lehman, and obtained consent to search the vehicle from the driver and owner of the vehicle. Four Ziploc baggies of marijuana were then found in the trunk in the pizza box. Both occupants were then arrested and charged with possession with intent to deliver marijuana.

Following closing arguments, the court found probable cause to bind over defendant to circuit court.

This Court finds that as a matter of law, the COMET team were within proper boundaries of procedure when observing the drug transaction occur by looking through the defendant's apartment's window through both the naked eye and binoculars. Based on this personal knowledge, authorization was obtained to obtain a search warrant of the apartment. While the search warrant was being prepared, the defendant was arrested outside of his apartment, searched

whereupon \$143 were found. He was then transported to the police department. When the search warrant was delivered, prepared by Officer Taylor, the officers then went into the apartment and found approximately 1300 grams of marijuana, a scale, and packaging materials.

Defendant maintains the affidavit for the search warrant contained false information as it purportedly said that the money used was pre-recorded money, when in fact, it was not. However, the Court has no copy of the affidavit and cannot confirm or disaffirm defendant's contentions². The *Franks* Court held that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included *by the affiant* in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. *Id* at 154. (Emphasis added.)

In the instant case, the false information purportedly contained within the affidavit had no bearing on probable cause that a crime was committed in this case. Regardless of whether there was pre-recorded money used or not, defendant was lawfully observed conducting a drug for money transaction. Therefore, according to case law, there will be no *Franks*' Hearing held.

Defendant requests the Court quash the search warrant as a result of the illegal search and false statements provided therein. The Court finds there was no illegal search performed. Defendant entitled his motion "..... and in-camera hearing with confidential source." Because Defendant never addressed this issue within his motion or brief, the Court considers this an abandoned request.

² Defendant indicated the search warrant and affidavit were attached to his brief as Exhibit A; however, the Court cannot find the referred-to Exhibit.

For the above-stated reasons, the Court finds defendant properly bound over based on sufficient probable cause that he committed a crime; the Court also finds that the alleged false information in the affidavit for the search warrant was not necessary to the finding of probable cause, accordingly, a *Franks*' Hearing is not necessitated, and finally, case law supports the method in which the authorities obtained the information necessary to arrest defendant.

For the above-stated reasons, defendant's motion for *Franks*' Hearing and to quash search warrant and in-camera hearing with confidential source is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the pending issues and does not close the case.

IT IS SO ORDERED.

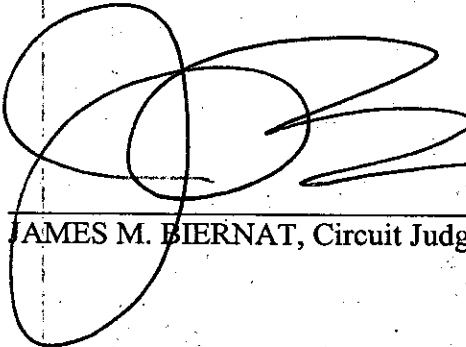
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DATED: _____

cc: Denise Hart, Asst. Prosecuting Attorney

Cecil D. St. Pierre, Jr., Attorney at Law



JAMES M. BIERNAT, Circuit Judge